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No. 401

In the Supreme Court of the United States

OCTOBER TERM, 1935

THE UNITED STATES OF AMERICA, PETITIONER

v.

WILLIAM M. BUTLER, ET AL, RECEIVERS OF HOOSAC MILLS CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

AMICUS CURIAE ARGUMENT BY TEXAS AGRICULTURAL ASSOCIATION IN BEHALF OF PETITIONER.

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The primary issue raised by this appeal is the validity of the Agricultural Adjustment Act, being the Act of Congress of May 12, 1933, c. 25, 48 Stat. 31, as amended by an Act of Congress approved August 24, 1935, (Public 320, 74th Cong., 1st sess.).

This primary issue involves the questions: (i) Is the tax imposed by the Act a direct or an excise tax?; (ii) Are the provisions for floor-stocks taxes valid?; (iii) Does the Act involve an improper delegation of legislative power?; (iv) Does the Act contravene the Fifth Amendment?; (v) Does the Act contravene the Tenth Amendment?; (vi) Do the Respondents have the right to question the validity of the Act imposing a tax upon them because of the exercise of the fiscal

power of Congress in appropriating the funds raised by such taxes?; (vii) If the Agricultural Adjustment Act, c. 25, 48 Stat. 31, was invalid as originally enacted, has the Congress by the Act approved August 24, 1935, Public 320, 74th Cong., 1st sess., ratified the assessment and collection of taxes under the original Act so that the validity of the assessment and collection of the taxes involved in this case cannot be now questioned.

The questions will be discussed in the order stated.

i.

The Agricultural Adjustment Act, c. 25, 48 Stat. 31, has as its purpose the raising of revenue. This is made evident by the provisions of the Act, including the provisions regarding the use to be made of the funds raised by the taxes assessed and collected under the terms of the Act.

The Act is captioned as "an Act * * * *to raise revenues* for extraordinary expenses incurred by reason of such emergencies, to provide emergency relief with respect to agricultural indebtedness." The language used in section 9 (a), is "*to obtain revenues for extraordinary expenses* incurred by reason of the National Economic emergency, *there shall be levied processing taxes* as hereinafter provided." Section 9 (b) provides that "*the processing tax shall be at such rate.*" Section 19 (a) provides that "*the taxes provided in this title* shall be collected by the Bureau of Internal Revenue under the direction of the Secretary of the Treasury. Such taxes shall be paid into the treasury of the United States." Section 19 (b) provides that "all provisions of law, including penalties, applicable with respect to taxes imposed by section 600 of the Revenue Act of 1926, and the provision of section 626 of the Revenue Act of 1932, shall,

in so far as applicable and not inconsistent" be applied with regard to taxes imposed by this Act, with certain provisions allowing the Secretary of the Treasury to permit a postponement of the payment of the taxes levied by this statute. Provision is made by section 19 (c) for the borrowing of money from the Reconstruction Finance Corporation with which to pay taxes imposed by the Act. Section 12 (b) appropriates the proceeds derived from all taxes imposed under the Act. Sections 15 and 16 primarily deal with the subject of taxes imposed by the Act.

The tax is imposed upon the processing of commodities; the amount, not the rate, being dependent upon the quantity processed. The imposition of the tax is not conditioned on a failure of persons to conform their business operations to certain regulations, but is imposed upon the processing of the commodity. The language of the Act evidences that the purpose of the legislation has a relation to the raising of revenue. This is the test as to whether it is a revenue measure. *United States* v. *Doremus*, 249 U. S. 86; *Arizona* v. *California*, 283 U. S. 423 (455-456). The Act meets this test.

The Constitution divides the taxing power of the general government into two great classes. It grants to the general government plenary and absolute power to levy direct taxes, subject to the limitation that they be apportioned among the several states in proportion to population, and a like power to lay and collect duties, imposts and excises, subject to the limitation that they be uniform throughout the United States. The Sixteenth Amendment did not extend the taxing power to new subjects, but only removed the necessity which might have otherwise existed for an apportionment among the states of taxes laid on in-

come. "The term 'excises' is applied to the taxes laid upon the manufacture, sale, or consumption of commodities within the country, upon licensing to pursue occupations, and upon the corporate privilege." This Court has held "that direct taxes, in the constitutional sense, embrace not only taxes on lands and capitation taxes, but all burdens laid on real or personal property because of its ownership; and also taxes on the income of such property." *Cooley's Constitutional Limitations* (8th Ed.) 988-999, 1022; *Pollock* v. *Farmers Loan & Trust Company*, 157 U. S. 429; *Knowlton* v. *Moore*, 178 U. S. 41; *Flint* v. *Stone Tracy Company*, 220 U. S. 107; *Brushaber* v. *Union Pacific Ry. Co.*, 240 U. S. 1; *Stanton* v. *Baltic Mining Company*, 240 U. S. 103; *Peck & Company* v. *Lowe*, 247 U. S. 165; *Eisner* v. *Macomber*, 252 U. S. 189.

The question then arises: Are the taxes imposed by the Agricultural Adjustment Act "excises"?

Section 9 (a) provides that "*the processing tax shall be levied, assessed and collected upon the first domestic processing of the commodity*, whether of domestic production or imported, and shall be paid by the processors." As applied to cotton the Act defines the term "processing" to mean "*the spinning, manufacturing, or other processing* (except ginning) of cotton; and the term 'cotton' shall not include cotton linters." As applied to wheat, rice and corn, the term is defined to mean *the milling or other processing* of the commodities; as applied to tobacco, the term is defined to mean *the manufacturing or other processing* thereof; as applied to hogs, the term is defined to mean *the slaughter for market;* and as applied to all other commodities, it is defined to mean "*any manufacturing or other processing involving the change in the form of the commodity or its preparation for mar-*

ket" * * *. The meaning of the word as involved in this suit must be construed in connection with its associate words "*spinning*" and "*manufacturing.*" *Georgia Warehouse* v. *Jolley*, 157 S. E. 276, 172 Ga. 172. It refers to the conversion of cotton through manufacturing into usable articles of commerce. The term means more than the mere separation of the lint cotton from the seed and the baling of the lint cotton, for the language of the Act expressly includes ginning of cotton from the meaning of the term. This definition of the word brings the tax squarely within the language "excises usually look to a particular subject, and levy burdens with reference to the Act of manufacturing them, selling them, etc." *Knowlton* v. *Moore*, 178 U. S. 41, 88. A tax upon the sale, use or manufacture of property is the character of tax that this Court has held to be an excise, and it is submitted that the tax imposed by this Act meets that test.

ii.

If the tax imposed upon floor-stocks is imposed solely because of the ownership of property, its validity may be questioned; but if the tax is an excise, or is imposed for administrative purposes to prevent evasions, then it can be sustained.

The language of Section 16 (U.S.C.A., Title 7, sec. 616) is important. This Section provides for a tax adjustment, using the language "*upon the sale or other disposition of any article processed*" and "*is held for sale or other disposition.*" Retail stock of persons engaged in retail trade are excepted from the tax imposed by Section 16, sub-section a, but the exception does not include stocks held in warehouses or stocks which are not sold or otherwise disposed of within thirty days from the effective date of the Act.

The tax is imposed upon the holding of the articles for *sale or other disposition.* It is a tax levied upon the intended use of articles that have been processed from a commodity subject to the tax provided in the Act. The Act *does not provide that all persons owning articles* processed from a taxable commodity *shall be liable for the tax,* but that *the tax is imposed on the holding of the articles for sale or other disposition.* This is not a tax based upon ownership, but a tax based upon the use to be made of the article of property. It is a tax upon the holding of the article in contemplation of sale. The language "other disposition" is general, but is clearly limited by the more specific word "sale," which immediately precedes it, to a disposition by sale.

In *First Savings Bank of Ogden* v. *Burnet,* 53 Fed. (2d) 919 (920), the Court considered the language "loss sustained from a *sale or other disposition* of property," as used in Section 202 (a) of the Revenue Act of 1921, and said,

> * * * "We feel constrained to hold that the rule of ejusdem generis is applicable in construing the phrase, and that it relates only to such dispositions of property as are like sales."

In *Alcolea* v. *Smith,* 90 So. 769, 772; 150 La. 482; 24 A. L. R. 815, the Court considered the language "*sale or other disposition*" and said:

> * * * "The word 'sale' conveys no such idea, nor do the words 'or other disposition' which follow it, since a sale is an alienation, a parting with, and 'or other disposition,' following the word 'sale,' means an alienation, or parting with, ejusdem generis as sale; and either the sale of a thing or other disposition of it is the antithesis of the keeping of the thing and the appropriating of it to oneself."

It seems clear that the meaning of the term, "or other disposition," following the word "sale," is limited to such a disposition as would be within the meaning of the word "sale."

It is upon the holding of the article for one purpose, therefore,—the purpose of sale—that the tax is imposed. The tax, being imposed upon the holding of the article for a particular purpose, meets the test of an excise.

This position is sustained by the holding in *Patton* v. *Brady*, 184 U. S. 608, where the Court considered a statute assessing and levying a tax upon articles "held and intended for sale." In the opinion in that case, the Court said:

> * * * "The tax on manufactured tobacco is a tax on an article manufactured for consumption, and imposed at a period intermediate the commencement of manufacture and the final consumption of the article,"

and held the tax imposed by the statute to be an excise.

The construction here contended for of the provisions of the Act imposing a tax on floor stocks appears to be a reasonable construction and consistent with the legislative intent. When so construed, the Act is valid.

It is a general and fundamental rule that if a statute be reasonably susceptible of two interpretations, one of which would render it unconstitutional and the other valid, the Courts will adopt that construction which will uphold its validity; there being a strong presumption that the law-making body intended to act within, and not in excess of, its constitutional authority. *Plymouth Coal Co.* v. *Pennsylvania*, 232 U. S. 531.

These provisions of the Act being reasonably subject to a construction (consistent with the apparent legislative intent) under which the Act would be upheld, it is respectfully submitted that the Act should be given that construction and upheld.

If the Act had not contained provisions for floor-stock taxes and the adjustment thereof, it would, both theoretically and practically, have been possible for designing persons, having knowledge in advance of the effective date of the Act, to circumvent the levy of the tax. Having knowledge that the Act would become effective at a later date, processors could have manufactured large stocks of articles for future sale and use, and have avoided thereby payment of the tax on the commodities processed in the manufacture of such stocks. In contemplation of the suspension or expiration of the Act, they could in like manner have avoided taxes by refraining from processing articles. Such evasions were prevented by the provisions of the Act providing for floor-stock taxes. The provisions were necessary to make sure that the tax fell equally upon all processors. These provisions of the Act were proper to insure uniformity and equality and to prevent attempted evasions of the plain purpose and intent of the Act. The provisions were necessary for the equal enforcement and proper administration of the features of the Act which impose a tax on the processing of commodities.

The assignments of error filed by Respondents in the Circuit Court of Appeals raised, among other questions, the contention that the processing and floor taxes, "if excise taxes, are not uniform throughout the United States, and are therefore not authorized under the Constitution." *Butler* v. *United States*, 78 Fed. (2d) 1 (2). It is essential to the validity of an excise imposed by an Act of Congress that it be "uni-

form throughout the United States." *United States Constitution*, Art. I, sec. 8, cl. 1; II *Cooley's Constitutional Limitations* (8 Ed.) 988.

In *Knowlton* v. *Moore*, 178 U. S. 41 (106, 108), the Court said:

> * * * "By the result then of an analysis of the history of the adoption of the Constitution it becomes plain that the words 'uniform throughout the United States' do not signify an intrinsic but simply a geographical uniformity."
>
> * * * "But what the Constitution commands is the imposition of a tax by the rule of geographical uniformity, *not that in order to levy such a tax objects must be selected which exist uniformly in the several states.*" *(Italics ours)*

The tax is imposed upon the processing of the commodity without limitation as to where the commodity is produced or where processed. The manufacturing in Texas of cloth from cotton is made the subject of the tax, without regard as to where the cotton was produced. The manufacturing in Massachusetts or North Carolina of cloth from cotton is made the subject of the tax, without regard as to where the cotton was produced. The tax is levied on the processing of the cotton into cloth, and this without limitation or restriction as to the place of production or the place of manufacture. Great quantities of cotton are produced in Texas, but if any cotton is produced in Massachusetts, that fact is not generally known. The quantity of cotton consumed in manufacturing processes in Texas is relatively less than the amount consumed in manufacturing processes in other states, but the tax is imposed with uniformity wherever the processing is done. The tax is imposed "by the rule of geographical uniformity," but the object of the tax does not exist uniformly in the sev-

eral states and, indeed, it is not necessary "that in order to levy such a tax objects must be selected which exist uniformly in the several states." *Knowlton* v. *Moore*, 178 U. S. 41.

iii.

The opinion of the Circuit Court of Appeals in this case discusses the power of Congress to control or regulate the production of agricultural commodities and concludes that the power of control and regulation over such matters is left to the states. Whether that question is determinative of the issues involved in this case depends upon whether the Act in question is a revenue measure or only an attempt to regulate and control the production of the commodities named in the Act.

It has heretofore been shown that the Act provides for the raising of revenue and that it meets the test stated in *United States* v. *Doremus*, 249 U. S. 86:

> "Have the provisions in question any relation to the raising of revenue?"

It has been shown that the tax is imposed upon the processing of a commodity without regard to the manner in which the processor may conduct his business, and that it is a tax on the use of commodities and not a tax imposed because of failure to conduct a business according to some prescribed regulation. Apparently the Circuit Court of Appeals did not regard this question as determinative of the issue, because the Court said:

> "The issue of whether under the Act there has been any unauthorized delegation by Congress of its legislative powers is decisive of the case before this Court."

Does the Act involve an unauthorized delegation of the legislative powers of Congress?

It will not be questioned that the *Congress cannot delegate* its discretion under the Constitution to determine what the law should be or its power to enact such law. It cannot be questioned that the *Congress may select* instrumentalities for the purpose of ascertaining facts upon which the operation of a law may depend, or give authority to administrative officers to determine the existence of facts, or give power to administrative officers to prescribe rules in the enforcement and administration of a law, or give to administrative officers the duty to carry out a legislative policy declared by the Congress. *United States* v. *Chemical Foundation*, 272 U. S. 1, 12; *United States* v. *Shreveport Grain & Elevator Co.*, 287 U. S. 77 (85); *Field* v. *Clark*, 143 U. S. 649 (693). The rule is clearly stated in *Panama Refining Co. et al* v. *Ryan et al*, 293 U. S. 388 (426):

> * * * "The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility."

The issue here is: Does the Act delegate the power to make the law, or does it only confer authority to ascertain the facts and to exercise discretion, in pursuance of the law, in its execution?

Section 1 of the Act declares:

> "That the present acute economic emergency being in part the consequence of a severe and increasing disparity between the prices of agricultural and other commodities, which disparity has largely destroyed the purchasing power of farmers for industrial products, has broken down the orderly exchange of commodities, and has seriously impaired the agricultural assets supporting the national credit structure, it is hereby declared that these conditions in the basic industry of agriculture have affected transactions in agricultural commodities with a national public interest, have burdened and obstructed the normal currents of commerce in such commodities."
>
> * * *

Section 2 (1) declares that it is the policy of Congress

> "To establish and maintain such balance between the production and consumption of agricultural commodities, and such marketing conditions therefor, as will re-establish prices to farmers at a level that will give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period."

As applied to cotton, the base period is fixed at from August 1909 to July 1914.

Section 3 directs the Federal Farm Board and all departments and agents of the government, excepting the Federal intermediate credit bank, to sell to the Secretary of Agriculture, and authorizes the Secretary of Agriculture to purchase, all cotton now owned

by them. Provision is made for settlements necessary in the acquisition of the full legal title of such cotton.

Section 4 authorizes the Secretary to borrow money upon the cotton so purchased.

Section 5 authorizes the Reconstruction Finance Corporation to make loans to the Secretary of funds to be used in acquiring the cotton.

Section 6 authorizes the Secretary to enter into option contracts with producers of cotton; evidently contemplating that such option contracts shall involve the cotton to be purchased by the Secretary under Section 3.

Section 8 provides that in effecting the policy declared (Section 1 and Section 2), the Secretary of Agriculture shall have power

> "To provide for reduction in the acreage or reduction in the production for market, or both, of any basic agricultural commodity, through agreements with producers or by other voluntary methods, and to provide for rental or benefit payments in connection therewith or upon that part of the production of any basic agricultural commodity required for domestic consumption, in such amounts as the Secretary deems fair and reasonable, to be paid out of any moneys available for such payments."

This language indicates that the Secretary is empowered to provide for rental benefit payments in connection with reduction agreements and that he is empowered to provide for rental or benefit payments upon "that part of the production of any basic agricultural commodity required for domestic consumption."

Section 9 (a) provides that,

> "To obtain revenue for extraordinary expenses incurred by reason of the national economic

emergency, there shall be levied processing taxes as hereinafter provided. When the Secretary of Agriculture determines that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination, and a processing tax shall be in effect with respect to such commodity from the beginning of the marketing year therefor next following the date of such proclamation. The processing tax shall be levied, assessed, and collected upon the first domestic processing of the commodity, whether of domestic production or imported, and shall be paid by the processor."

It is provided that the tax shall terminate at the end of the current marketing year when the Secretary proclaims that the rental or benefit payments shall be discontinued and it is directed that the marketing year shall be ascertained and prescribed by regulations of the Secretary.

Section 9 (b) provides:

"The processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity" * * *.

It is provided in this section that if the Secretary has reason to believe the tax, at the rate prescribed, will bring about such reduction in the domestic consumption of the commodity as to result in an accumulation of surpluses or in a reduction of farm prices, then that after notice and hearing and a finding that such results would follow, the processing tax shall be at such rate as will avoid the accumulation of surpluses and depression of prices.

Section 9 (c) provides that,

* * * "the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity

had during the base period" * * * "and the current average farm price and the fair exchange value *shall be ascertained by the Secretary of Agriculture from available statistics of the Department of Agriculture.*" *(Italics ours)*

Section 10 (c) provides that the Secretary, with the approval of the President, may make "regulations establishing conversion factors for any commodity and article processed therefrom to determine the amount of tax imposed or refunds to be made with respect thereto."

Section 12 (a) makes an appropriation to the Secretary for administrative expenses and for rental and benefit payments.

Section 12 (b) appropriates the proceeds derived from taxes imposed by the Act for expansion of markets, removal of surpluses, administration expenses, rental and benefit payments and refunds on taxes. This Section directs the Secretary of Agriculture and the Secretary of the Treasury to establish the amounts, over and above the appropriation made by Section 12 (a) currently required for the purposes of the Act and authorizes the Secretary of the Treasury, out of any money not otherwise appropriated, to advance to the Secretary of Agriculture the amount so estimated. The amounts so advanced are later to be deducted from the proceeds of the tax imposed by the Act.

Section 14 declares the legislative intent that the provisions of the Act are separable.

Section 16 provides for taxes on floor-stocks at the rate or in an amount equal to the processing tax "which would be payable with respect to the commodity from which processed if the processing had occurred" on the date the tax first takes effect and for adjustments of such tax.

These are the provisions of the Act involved in this case.

The suit originated by the United States filing a claim with the Receivers for processing and floor taxes levied against Hoosac Mills Corporation under Section 9 and Section 16 of the Act. It is not a suit to restrain the levy of a tax or the disbursement of funds under the appropriation made by the Act, but, in so far as Respondents are concerned, it is an attempt to defeat the payment of the taxes levied.

The issue involved is the validity of what has been done under the Act, and not the validity of a threatened action. This distinction is important.

Whether the adjustment or reduction authorized by Section 9 (a) and 9 (b) amount to an improper delegation of power is not involved because the taxes in issue were not levied in connection with any such adjustment or reduction and in the administration of the Act there has not ben any attempt to adjust the rate under either of these provisions. *Mountain Timber Co.* v. *Washington*, 243 U. S. 219; *Jeffrey Mfg. Co.* v. *Blagg*, 235 U. S. 571 (576); *Utah Power & Light Co.* v. *Pfost*, 286 U. S. 165 (186); *Champlin Rfg. Co.* v. *Commission*, 286 U. S. 210 (235). These provisions of the Act appear to be separable, and even if they were determined to be improper delegations of legislative power, nevertheless the provisions on which rest the tax involved in this case would remain in force. Instead of appearing evident that the Congress would not have enacted the provisions imposing the tax, independently of those which allow the adjustment, the wording of the Act indicates that the Congress would have enacted the provisions imposing the tax, independent of those provisions which permit the adjustment.

But, even if it be considered that the Congress would not have enacted the provisions imposing the tax, independently of the provisions authorizing the adjustment, these latter provisions are sustainable under the decisions of this Court. The authorized adjustment of the rate is to prevent surpluses and the depression of farm prices, clearly indicating that these provisions do not contemplate an increase in the base rate provided for by Section 9 (a), (b) and (c), but a reduction, when necessary, to prevent the conditions described in the Act.

In *Field* v. *Clark*, 143 U. S. 649 (680-697), the Court sustained a statute conferring upon The President authority to suspend, by proclamation, the free introduction of certain commodities when he was satisfied that any country producing such articles imposed duties or other taxes upon products of the United States, which he determined to be reciprocally unequal or unreasonable.

In *Hampton & Co.* v. *United States*, 276 U. S. 394 (404-412), the Court sustained an Act empowering The President to increase or decrease duties to equalize differences ascertained by him between domestic production and the cost of producing like articles in competing foreign countries. The Act involved provided that in ascertaining the differences in cost of production The President should, in so far as he found it practical, take into consideration:

> * * * "(1) the differences in conditions in production, including wages, costs of material, and other items in costs of production of such or similar articles in the United States and in competing foreign countries; (2) the differences in the wholesale selling prices of domestic and foreign articles in the principal markets of the United States; (3) advantages granted to a for-

eign producer by a foreign government, or by a person, partnership, corporation, or association in a foreign country; and (4) any other advantages or disadvantages in competition."

Speaking of this Act the Court said:

> "What The President was required to do was merely an execution of the Act of Congress. It was not the making of law. He was the mere agent of the law making department to ascertain and declare the event upon which its expressed will was to take effect."

It is not conceivable that there would be any greater difficulty to determine that a tax was causing the accumulation of surpluses and depression of farm prices, than it would be to determine the cost of production, including wages, materials and other items entering into such cost of *similar* articles in the United States and in *competing* foreign countries, and the advantage granted to foreign producers by foreign governments and any *other advantages* or *disadvantages in foreign competition.*

If the Act involved in *Hampton & Co.* v. *United States,* 276 U. S. 394, prescribes a certain and definite criteria to be taken into consideration in ascertaining the differences, assuredly, the Act involved in this case speaks with equal certainty. The authority granted the Secretary to make adjustments is analogous to the power upheld in *Heiner* v. *Diamond Alkali Co.,* 288 U. S. 502 (504-507).

The issue of unauthorized delegation of legislative power is then, so far as this case is concerned, reduced to the question, "Does the Act delegate to the Secretary the legislative authority to determine a tax rate, and the time when it shall take effect and end; or does the Act prescribe the formula for computing the rate of tax, and the time when it shall begin and

end, depending upon the existence of facts to be ascertained by the Secretary?".

The Act provides that "the processing tax shall be at such rate as equals the difference between the current average farm price for the commodity and the fair exchange value of the commodity" * * * "the fair exchange value of a commodity shall be the price therefor that will give the commodity the same purchasing power, with respect to articles farmers buy, as such commodity had during the base period (August 1909 to July 1914) * * * and the current average farm price and the fair exchange value shall be ascertained by the Secretary of Agriculture from *available statistics of the Department of Agriculture.*"

This is the formula for computing the rate of tax. Does it fix a certain criteria to be used in computing the rate?

The practice of the Department of Agriculture to collect and publish statistical facts concerning agricultural productions and markets has been in existence for a long period of years. Congress was evidently familiar with this practice and in general with the statistical information available in the Department because it provided that the "current available farm price and the fair exchange values" should be ascertained by the Secretary from such statistics. The facts were so ascertained. (R. 11).

Determination of the "current average farm price and the fair exchange value" involved the application of elementary principles of mathematics to the "available statistics of the Department of Agriculture." The determination of the tax from "the current average farm price and the fair exchange value" at such rate as equals the difference between the current average farm price for the commodity and the fair

exchange value of the commodity involved no more than the application of principles of mathematics to the figures previously determined. (R. 11).

The Congress prescribed the rule by which the rate should be figured and empowered the Secretary to do no more than determine the facts, and apply the facts to the rule and figure the rate from the facts by the rule. There is no more delegation of legislative power here than where a state prescribed by law that a State Tax Board shall ascertain the intangible values of property for purposes of taxation or that such Board shall compute an ad valorem tax rate by dividing the total of all ad valorem taxes collected during the previous year by the quotient of the total valuation of all property within the state divided by 100. The formula is prescribed by legislative enactment, and the administrative officer is directed to ascertain the facts and by applying them to the formula to figure the rate of tax.

In *Michigan Central Railway Company* v. *Powers*, 201 U. S. 245, 297, the Court said:

> "It may be laid down as a general proposition that where a legislature enacts a specific rule for fixing a rate of taxation, by which rule the rate is mathematically deduced from facts and events occurring within the year and created without reference to the matter of that rate, there is no abdication of the legislative function, but, on the contrary, a direct legislative determination of the rate."

The Secretary is not empowered by these provisions of the Act to fix the rate; he is directed to compute the rate by a formula prescribed by Congress. The provision of the Act directing the Secretary to compute the rate does not grant to him authority or discretion to determine what the rate shall be,

but imposes upon him a duty to determine existing, controlling facts, and figure the rate on these facts by the formula prescribed by Congress.

The Act provides that a tax "shall be in effect with respect to such commodity from the beginning of the market year" and that "the market year for each commodity shall be ascertained and prescribed by regulations of the Secretary of Agriculture."

Cotton matures, is harvested and sold during particular seasons of the year. The same is true of grain crops, such as wheat and corn. In determining the carry-over from year to year it has long been the custom to treat a certain date as the end of one market year and the beginning of another. These dates are well known and understood, not only by experts in the Department of Agriculture, but by the people who are engaged in the planting and production of these commodities and in their marketing and manufacture. The language directing the Secretary to ascertain "the market year" may well be construed as meaning that the market year for each commodity is as has been previously ascertained by the Secretary under departmental rules because it is well known that long prior to the enactment of this statute the Department of Agriculture had recognized certain dates as the beginning of market years for certain commodities. If the language of the Act be construed to mean that the marketing year is as has heretofore been determined by the Secretary under the regulations prescribed in the Department of Agriculture, then the Congress has definitely fixed the period by reference to an existing determination. Such would be a reasonable construction of the language and would not do violence to the apparent legislative intent. So construed, the provision would appear to be entirely valid, and if under some other

construction the provision might be invalid, then that construction should be adopted which will give the Act validity.

On the other hand, if the Congress intended that the tax should take effect from the beginning of the market year, the date to be determined in the future by the Secretary of Agriculture, it is not to be presumed that the Congress intended to delegate to the Secretary an arbitrary discretion to determine the market year. This is because legislative bodies are presumed to act within, and not beyond, their constitutional authority. If the language is construed to mean that the Secretary shall, in the future, ascertain the market years for the commodity then clearly it must be held to mean that he shall ascertain the facts as to what period of time constitutes the market year for the particular commodities involved in the Act. This would involve the finding of an existing fact upon which the tax should operate.

Suppose the Congress had provided for a tax based upon reasonable market value, such market value to be ascertained by the Secretary of Agriculture. The language would not have been indefinite, it would not delegate a power to determine what the rate of tax should be, but would have directed an administrative officer to determine the facts upon which the tax should operate. Throughout this country Boards of Equalization, Tax Assessors and Tax Collectors are daily ascertaining the value of property for purposes of taxation. There is no more difficulty in finding the facts as to "the market year" of a commodity than in determining the market value of a commodity or other article of property subject to taxation.

Sections 2, 8, and 9 should be read together in determining whether there has been an unauthorized

delegation of the power to determine when the tax shall become effective.

Section 2 declares it to be the policy of Congress to establish and maintain an equality between production and consumption of agricultural commodities that will re-establish to farmers prices which will give agricultural commodities a purchasing power, as related to articles consumed by farmers, equivalent to the purchasing power of such commodities during the base period. In enacting the law and declaring this policy, the Congress found, in effect, that such equality did not at the time exist.

Section 8 empowers the Secretary, in order to effectuate the policy of Congress, to provide for a reduction in acreage and production for marketing "through agreements with producers or other voluntary methods" and to make provision for rental or benefit payments in connection with such reduction or upon that part of the production required for domestic consumption.

Section 9 provides that when the Secretary determines "that rental or benefit payments are to be made with respect to any basic agricultural commodity, he shall proclaim such determination and a processing tax shall be in effect with respect to such commodity."

The voluntary reductions and the rental and benefit payments are to be made, if at all, for the purpose of attaining the policy of the Act. Current consumption in domestic and foreign markets is to be considered as well as the cost of agricultural commodities to the consumer. The Secretary is to determine, through the agencies available to him, when a sufficient number of producers are willing to enter into a voluntary reduction program to effectuate the declared policy of the Act. The Congress has deter-

mined that there is an inequality between production and consumption; that to establish the desired prices, reduction in acreage and rental and benefit payments should be made. The time when the reduction will accomplish the desired is a fact to be found. The practicability of effectuating the policy depends upon the willingness of a sufficient number of producers to enter into voluntary agreements for a reduction of acreage and production with which may be associated rental and benefit payments, and effectiveness of such in accomplishing the desired equality in prices.

The Congress has established the standards and has directed the Secretary to find the existence of certain facts. The Secretary is not empowered to prescribe a tax or the date that a tax shall become effective, but Congress has prescribed a tax and provided that it shall become effective upon the existence of certain facts, to be determined by an administrative officer.

As was said in *Hampton & Co.* v. *United States*, 276 U. S. 394 (407):

> "Congress may feel itself unable conveniently to determine exactly when its exercise of the legislative power should become effective, because dependent on future conditions, and it may leave the determination of such time to the decision of an Executive, or, as often happens in matters of state legislation, it may be left to a popular vote of the residents of a district to be affected by the legislation." * * *
>
> "'The true distinction, therefore, is, between the delegation of power to make the law, which necessarily involves a discretion as to what it shall be, and conferring an authority or discretion as to its execution, to be exercised under and in pursuance of the law. The first cannot be done; to the latter no valid objection can be made.'"

The statute involved in *Field* v. *Clark*, 143 U. S. 649 (680), provided that "so often as the President shall be satisfied that the government of any country producing and exporting" certain commodities imposed duties upon agricultural products of the United States which "he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend" * * * "the provisions of this Act relating to the free introduction of sugar" and other named commodities, "for such time as he shall deem just." Speaking of this statute, the Court said:

> * * * "But when he ascertained the fact that duties and exactions, reciprocally unequal and unreasonable, were imposed upon the agricultural or other products of the United States by a country producing and exporting sugar, molasses, coffee, tea or hides, it became his duty to issue a proclamation declaring the suspension, as to that country, which Congress had determined should occur. *He had no discretion in the premises except in respect to the duration of the suspension so ordered. But that related only to the enforcement of the policy established by Congress.* As the suspension was absolutely required when the President ascertained the existence of a particular fact, it cannot be said that in ascertaining that fact and in issuing his proclamation in obedience to the legislative will, he exercised the function of making laws. Legislative power was exercised when Congress declared that the suspension should take effect upon a named contingency. What the President was required to do was simply in execution of the act of Congress. It was not the making of law. He was the mere agent of the law-making department to ascertain and declare the event upon which its expressed will was to take effect." *(Italics ours)*

It was impossible for the Congress to ascertain in advance the facts which the Secretary is directed to determine. What he was to do in this relation was not a matter of making law or prescribing a tax, but the determination of facts upon which the Act of Congress should operate.

When the policy of Congress has been attained or the facts upon which the reduction program is to be begun and rental and benefit payments made no longer exist, there will be a termination of the tax. A finding that the conditions upon which the operations of the law originally depended no longer exist does not involve any more exercise of legislative discretion than the original finding of the existence of such conditions.

It is submitted that the rate of the tax is to be determined upon readily ascertainable facts; that the determination of "the marketing year" does not involve the exercise of legislative discretion; that definite standards are prescribed as to the time when the tax shall become effective and as to the time when it shall end.

iv.

The right to select objects and prescribe rates of taxation is reposed in the Congress. It is not for the Courts to weigh the reasonableness of the tax, either as to rate or objects upon which it is imposed. *Patton* v. *Brady*, 184 U. S. 608; *McCray* v. *United States*, 195 U. S. 27 (58); *Flint* v. *Stone Tracy Co.*, 220 U. S. 107 (167). "The power to tax involves the power to destroy." *McCullough* v. *Maryland*, 4 Wheat. 316.

In *Billings* v. *United States*, 232 U. S. 261 (282), it is said:

> * * * "It is also settled beyond dispute that the Constitution is not self-destructive. In other words, that the powers which it confers on the one hand it does not immediately take away on the other; that is to say, that the authority to tax which is given in express terms is not limited or restricted by the subsequent provisions of the Constitution or the amendments thereto, especially by the due process clause of the Fifth Amendment."

In *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1 (24), the Court said:

> "So far as the due process clause of the Fifth Amendment is relied upon, it suffices to say that there is no basis for such reliance since it is equally well settled that such clause is not a limitation upon the taxing power conferred upon Congress by the Constitution; in other words, that the Constitution does not conflict with itself by conferring upon the one hand a taxing power and taking the same power away on the other by the limitations of the due process clause."

Magnano v. *Hamilton*, 292 U. S. 40 (44), cites *Brushaber* v. *Union Pacific R. R. Co.*, 240 U. S. 1, and makes the following statement:

> * * * "Except in rare and special instances the due process of law clause contained in the Fifth Amendment is not a limitation upon the taxing power conferred upon Congress by the Constitution."

The "rare and special instances" are illustrated by cases like *Nichols* v. *Coolidge*, 274 U. S. 531;

Schlesinger v. *Wisconsin*, 270 U. S. 230; *Heiner* v. *Donnan*, 285 U. S. 312; and *Hoeper* v. *Commissioner*, 284 U. S. 206.

The tax imposed by this Act is not like the taxes considered in the cases cited as illustrating the instances referred to in the quotation from *Magnano* v. *Hamilton*, 292 U. S. 40.

The assessment of the tax imposed by the Act in question is upon the cotton processed and the amount of the tax is determined by the quantity of cotton processed. The power of the Congress to classify, for purposes of taxation, where the classification bears a reasonable relation to the purpose of the law, cannot be questioned. The processing of agricultural commodities has been classified for purposes of taxation. The classification appears to have a reasonable relation to the purpose of the Act. It cannot be contended either that the Congress cannot classify for the purposes of taxation, or that if this be a classification, that it is an unreasonable and arbitrary classification.

v.

The assignments of error in the Circuit Court of Appeals and the opinion of the Circuit Court of Appeals in this case raise the question as to whether the Act is an attempt upon the part of the Congress to regulate activities solely within the control of the State. *Butler* v. *United States*, 78 Fed. (2d) 1. The question raised is whether the Act violates the Tenth Amendment.

It seems that this question is ruled by *Massachusetts* v. *Mellon*, 262 U. S. 447 (478-488), and not by *Schechter Corporation* v. *United States*, 295 U. S.

495. The Massachusetts case involved the validity of an Act of Congress appropriating money to be apportioned among such of the several states as might accept and comply with its provisions, for the purpose of cooperating to reduce maternal and infant mortality and protect health. A bureau was provided to administer the Act in cooperation with state officers. The Act did not require the states to accept its benefits or undertake to enforce upon the states or the people of the states obedience to any requirement of law, but left it optional with the states whether they accepted or rejected its benefits. The contention was made that the Act constituted an attempt upon the part of the general government to induce the states to yield a portion of their sovereign rights. The Court said:

> * * * "If Congress enacted it with the ulterior purpose of tempting them to yield, that purpose may be effectively frustrated by the simple expedient of not yielding."

In the Schechter Corporation case it was said that the codes involved did not merely give voluntary trade or industrial associations privileges or immunities, but involved "the coercive exercise of the law-making power," and that

> "The codes of fair competition which the statute attempts to authorize are codes of laws. If valid, they place all persons within their reach under the obligation of positive law, *binding equally those who assent and those who do not assent.* Violations of the provisions of the codes are punishable as crimes." *(Italics ours)*

The distinction between the statute involved in the Massachusetts case and the code and statute

involved in the Schechter case is that the one involved in the former made acceptance of its benefits optional, while the one involved in the latter made obedience to its terms obligatory.

The same distinction exists between the Act involved in this case and the statute and code involved in the Schechter Corporation case. There is no provision in the statute to compel any farmer to enter into an agreement to reduce the acreage planted to cotton or any other commodity mentioned in the statute. There is no provision requiring any farmer to accept any rental or benefit payments. The language of the Act is that the Secretary shall have power to provide for reduction in acreage "through agreements with producers, or by *other voluntary* methods, and to provide for rental or benefit payments in connection therewith." There is no semblance of a requirement or an attempt to require that any farmer enter into a reduction agreement; the acceptance of the benefits of the Act is entirely optional. The Secretary may enter into contracts with such farmers as wish to contract with him, but there is no provision requiring any farmer to so contract or to reduce his acreage. When a voluntary contract is made between the Secretary and a farmer, the Secretary may pay rental or benefit payments to him from money appropriated for that purpose. The right of the State, if any exists, to control commodities to which its land may be planted remains unimpaired by the provisions of this Act. What Congress may have hoped would be the result upon prices and production by the expenditure of money appropriated is one thing; and an attempt upon the part of Congress to *control* a matter of purely State concern would be an entirely different thing.

vi.

The power of Congress to impose a tax is one thing; its power to make an appropriation is another thing. There is a wealth of instances in which Congress has made appropriations similar to the appropriations made in this Act. One purpose for which the money is appropriated is "the removal of surplus agricultural products." In recent years Federal agencies have been authorized to buy agricultural commodities and to lend public money on agricultural commodities. Governmental agencies have been authorized to lend money to banks and trust companies, to irrigation districts, to cities and towns, and to invest public money in the stocks of state and national banks. Public money has been appropriated to promote the public health in the several states; to advance education; for social welfare work; in providing food for needy and distressed people; for making loans to agricultural and livestock raisers in drought stricken areas. Many instances might be furnished where Federal agencies over a long period of years have been authorized to spend Federal money in the relief of physical and economical distresses. There is nothing novel about the appropriation made by this Act.

A citizen might as well be heard to contest the validity of an income or inheritance tax imposed against him on the claim that a part of the tax paid may later be appropriated to some Federal agency to lend to some bank, or to some poverty stricken person in some tenement section of a great city, or to some drought stricken ranchman in the arid part of West Texas, as for Respondents to question the validity of the tax because of the appropriation of the proceeds.

vii.

In the Act approved August 24, 1935 (Public No. 320, 74th Cong., 1st Sess.), amending the Agricultural Adjustment Act, it is provided:

> "The taxes imposed under this title, as determined, prescribed, proclaimed and made effective by the proclamations and certificates of the Secretary of Agriculture or of the President and by the regulations of the Secretary with the approval of the President prior to the date of the adoption of this amendment, are hereby legalized and ratified, and the assessment, levy, collection, and accrual of all such taxes" * * * "prior to said date are hereby legalized and ratified and confirmed as fully to all intents and purposes as if each such tax had been made effective and the rate thereof fixed specifically by prior Act of Congress." * * * "Nothing in this section shall be construed to import illegality to any act, determination, proclamation, certificate, or regulation of the Secretary of Agriculture or of the President done or made prior to the date of the adoption of this amendment.
>
> * * * "The making of rental and benefit payments under this title, prior to the date of the adoption of this amendment, as determined, prescribed, proclaimed and made effective by the proclamations of the Secretary of Agriculture or of the President or by regulations of the Secretary" * * *, "and the adoption of other voluntary methods prior to such date" * * * "are hereby legalized and ratified, and the making of all such agreements and payments, the initiation of such programs, and the adoption of all such methods prior to such date are hereby legalized, ratified, and confirmed" * * *.

The power of the Congress to ratify an illegal assessment of taxes which was made under the

faith of congressional enactment, and which taxes the Congress had the power to impose, cannot be questioned. It is within the power of Congress to so ratify an illegal assessment of taxes, even after the commencement of suit for restitution. It has been held that in dealing with the Philippine Islands Congress may delegate legislative authority to agencies selected by it and may ratify the acts of such agents, the same as if the acts had been specifically authorized by prior Act. *United States* v. *Heinszen*, 206 U. S. 370; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226; *Dorchy* v. *Kansas*, 264 U. S. 286; *Charlotte Harbor Ry. Co.* v. *Welles*, 260 U. S. 8; *Kansas City So. Ry. Co.* v. *Road Improvement Dist.*, 266 U. S. 379; *Hodges* v. *Snyder*, 261 U. S. 600.

The ratification of the taxes involved in this suit being valid, all questions of improper delegation of legislative power are answered by the ratifying Act.

It is, therefore, respectfully submitted that the processing tax and floor-stocks taxes are valid excises; that there has been no improper delegation of legislative power by the Act involved, and if there ever were such, it has been cured by the validating Act; that the statute does not contravene either the Fifth or Tenth Amendment; that the Respondents have no right to question either the validity of the Act or the validity of the assessment and collection of the taxes involved in this case because of the exercise by Congress of its fiscal power to appropriate the proceeds of the tax, and that the Act should be upheld.

Respectfully submitted,

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